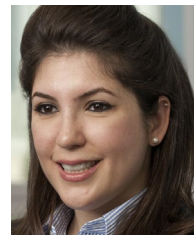


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### ENFORCEMENT

## The Impact of the New UAE Competition Law on Business



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### Introduction

The expiration date of August 23, 2013 is looming for the six month transitional period applying to the new United Arab Emirates (UAE) Federal Law No. 4 of 2012 (the Competition Law).<sup>1</sup>

Since it came into force on February 23, 2013, the new Competition Law has prohibited certain types of restrictive agreements and abuses of dominance and has introduced merger control. However, during the transitional period, while establishments<sup>2</sup> may still be subject to penalties for any breach of existing legisla-

<sup>1</sup> This update is based on an unofficial translation of the Competition Law from the official Arabic version.

<sup>2</sup> See Article 1 of the Competition Law. The Competition Law applies to establishments (any natural or legal person or consortium of such persons) engaging in economic activity or holding intellectual property rights in the UAE. Where economic activity occurs outside the UAE, but has the ability to affect competition in the UAE, these practices and agreements will also be subject to the Competition Law.

tion on competition,<sup>3</sup> no penalties are likely to apply for non-compliance with the Competition Law. Given the risk of penalties from August 23, 2013, this article now sets out the essential elements of the new Competition Law and gives some guidance as to how it will impact businesses operating in, or planning transactions that may affect, the UAE.

### Getting Clarity on the Competition Law

The full impact of the Competition Law will only be clear once the implementing regulations (the Implementing Regulations) are published. The Implementing Regulations will be published sometime during the summer of 2013 and will provide more detail on a number of important points, including:

- the jurisdictional thresholds and duration of the initial merger control review period;
- the scope of the *de minimis* exception applicable to certain restrictive agreements; and
- the exemption procedure for certain restrictive agreements and/or practices of dominant establishments.

### Affected Business Sectors

As can be seen from section 2 below, some of the largest business sectors in the UAE are excluded from the new Competition Law's scope of application. However, a number of sectors are still likely to be impacted including, for example, the construction industry which is the third largest sector of the economy after oil and trade. In particular, the restrictions on price-fixing and bid-rigging could be relevant in the construction sector where international experience has shown that competition authorities pay close attention to such practices.<sup>4</sup>

Bid-rigging occurs when businesses, that would otherwise be expected to compete, agree to raise prices or lower the quality of goods or services for purchasers who wish to acquire products or services through a bidding process.

### Mandatory Merger Control Filing Requirement

One of the most important effects of the introduction of the new Competition Law is that it provides for a mandatory filing requirement and for transactions to be suspended pending clearance. UAE merger control analysis must therefore now be factored into the planning of international or domestic mergers.

Several key questions remain open: (i) jurisdictional thresholds – so far this appears to be a market share threshold, the level of which is as yet unspecified. Clearly, the level at which it is set will have a significant bearing on the practical impact of the new merger control regime; (ii) the precise definition and interpretation

<sup>3</sup> Federal Law No. 4 of 1979 (Suppression of Fraud in Commercial Transactions Law), contains some provisions on competition issues, but those provisions relate more to fair dealing in commodities. Federal Law No. 24 of 2006 and its executive regulations (Consumer Protection Law and Regulations) grant the Consumer Protection Department the power to take appropriate action against monopolistic practices, however the remainder of the provisions are aimed at defective products and product recalls.

<sup>4</sup> See for example the UK Office of Fair Trading's investigation into bid-rigging in the construction industry ([http://www.offt.gov.uk/shared\\_offt/business\\_leaflets/general/CE4327-04\\_Decision](http://www.offt.gov.uk/shared_offt/business_leaflets/general/CE4327-04_Decision))

of the concept of control which currently appears very broad and may thus capture a wide range of transaction structures; and (iii) the timing of the initial (Phase I) review of a merger where no competition issues arise: this should normally be about one month to comply with international best practice and not unduly delay international transactions.

### Complying with the Competition Law

Establishments whose operations in the UAE are subject to the Competition Law must now ensure that they are fully compliant with the legislation when the transitional period expires on August 23, 2013. Practical steps that establishments can take at this stage include:

- in the context of mergers and acquisitions, consider the potential for making a notification in the UAE and the need for inserting an appropriate condition precedent in sale and purchase agreements regarding such a notification;
- review all existing agreements and practices to ensure compatibility with the Competition Law;
- ensure that all new agreements are negotiated and concluded on terms that comply with the Competition Law; and
- more generally, ensure that there are robust Competition Law compliance policies in place – this includes training staff as to the dos and don'ts going forward.

## Scope of Application

### State-Owned Entities Excluded

The actions of federal and local governments, and any state-owned establishments are expressly excluded from the application of the Competition Law.<sup>5</sup> This exception is broadly defined and encompasses any entity acting upon the authority of federal or local government as well as entities owned or controlled by federal or local government. The Competition Law however, does not specify the level of government control (or whether such establishments have been granted special or exclusive rights) required in order for the exemption to apply.

### Small and Medium Establishments Excluded

Small and medium establishments (SMEs) are excluded from the application of the Competition Law.<sup>6</sup>

The term "SME" has not yet been defined.

### Excluded Sectors

A number of sectors have been carved out from the scope of the application of the Competition Law, including some of the most prominent in the UAE: telecommunications, financial services, cultural activities (readable, audio and visual), pharmaceutical, utilities, waste disposal, transportation, oil and gas, as well as postal services.<sup>7</sup>

These sectors are primarily those subject to separate sector-specific regulatory regimes.

<sup>5</sup> Competition Law, Article 4(2).

<sup>6</sup> *Ibid.*, Article 4(3).

<sup>7</sup> *Ibid.*, Article 4(1) and the appendix to the Competition Law.

## Implementation and Enforcement

The UAE Cabinet (the Cabinet) is the executive body responsible for introducing and approving the Competition Law and has responsibility for determining the various thresholds that need to be set. The Cabinet is also charged with issuing the Implementing Regulations in due course. The Competition Law provides for the establishment of a Competition Regulation Committee (the Committee).<sup>8</sup> The Committee is charged with proposing policy and legislation for the protection of competition, considering issues, making recommendations on exempting restrictive agreements or dominant market practices and preparing annual reports.<sup>9</sup> The Committee will be chaired by the Deputy Minister of Economy (the Minister). However, the Ministry of Economy (the MoE), is the body responsible for implementing, monitoring and enforcing the provisions of the Competition Law.<sup>10</sup>

Resolutions issued by the Minister in accordance with the Competition Law can be appealed to the competent UAE court within 60 days of notification of the resolution.<sup>11</sup>

## Overview of Law — Similarities to EU Structure

The structure of the Competition Law is similar to the regime in the European Union (EU) in that it broadly covers three distinct areas: (i) merger control, (ii) restrictive agreements, and (iii) abuse of dominance. The provisions on restrictive agreements and abuse of dominance are similar to the equivalent EU provisions: Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU). Given the similarities between the two sets of provisions, EU case law on Articles 101 and 102 TFEU may provide useful insights into the likely application of the equivalent provisions of the Competition Law.

### Merger Control

The Competition Law provides that a notification must be made to the MoE in writing at least 30 days prior to completion where an as yet unspecified market share threshold is met.<sup>12</sup> Clarification of the jurisdictional threshold is a key point the Implementing Regulations must address.

The concept of an economic concentration covers transactions such as mergers, or acquisitions of assets, proprietary rights, usufruct or shares that enable one entity (or a consortium of entities) to control, whether directly or indirectly, the other entity. The Competition Law does not contain a more precise definition of control. The concept of an economic concentration thus currently appears broad enough to capture for example joint venture arrangements.<sup>13</sup>

The regime suspends mergers that constitute economic concentrations subject to the notification requirement until:

- a ministerial resolution is issued clearing the transaction; or
- after the expiration of 90 days (Phase I) from the date of submission of the notification (this 90 day period may be extended by an additional 45 days, for example, where the MoE has requested further information).<sup>14</sup>

The timetable for the issuance of ministerial resolutions clearing mergers where no competition issues arise still needs to be clarified – international best practice is for such periods to last no longer than four weeks, so as not to delay the implementation of international transactions unduly.

The substantive test for the assessment of mergers under the Competition Law is whether or not the merger will affect competition negatively or whether it will result in a positive economic impact that exceeds any negative impact on competition.<sup>15</sup>

The Minister has the ability to revoke a clearance decision where, post-clearance, it emerges that: the circumstances under which the clearance was granted no longer exist, the parties have breached any conditions attached to the clearance decision or the clearance was granted on the basis of misleading or incorrect information.<sup>16</sup>

### Restrictive Agreements

The Competition Law bars restrictive agreements. Prohibited restrictive agreements include but are not limited to, those that fix prices, rig bids, divide markets, allocate customers, preclude or impede entry into a business or business activity, refuse purchases from, or supplies to, another firm, limit the free flow of goods or services in a relevant market, limit terms of sale or purchase, or prohibit or limit production, development, distribution, marketing or other investments.<sup>17</sup>

The Competition Law provides for a *de minimis* exception to the prohibition on restrictive agreements (with the exception of price-fixing or market partitioning arrangements), based on the combined market share of the parties subject to the agreement. However, the *de minimis* exception is not explained further in the Competition Law.<sup>18</sup>

### Use of a Market Dominant Position to Restrict Competition

The Competition Law prohibits the use of a dominant position in a market to restrict competition. Actions that can constitute an abuse of dominance include but are not limited to: imposing resale price terms, predatory pricing, discriminatory pricing, refusing to deal, compelling others not to deal, restricting supply, conditioning the sale of a good or service on the purchase of another good or service, disseminating false information about products or prices as well as artificially increasing or decreasing quantities in a market.<sup>19</sup>

The Competition Law does not indicate what market share threshold is likely to indicate dominance – this will be set by the Cabinet. The Cabinet is empowered to

<sup>8</sup> Ibid., Article 12.

<sup>9</sup> Ibid., Article 13.

<sup>10</sup> Ibid., Article 14.

<sup>11</sup> Ibid., Article 27.

<sup>12</sup> This percentage is to be determined by the Cabinet – it is expected that this will be contained in the Implementing Regulations.

<sup>13</sup> Ibid., Article 1.

<sup>14</sup> Ibid., Article 10(2).

<sup>15</sup> Competition Law Article 11.

<sup>16</sup> Ibid., Articles 8(7) and 11(2).

<sup>17</sup> Ibid., Article 5.

<sup>18</sup> Ibid., Article 5(3).

<sup>19</sup> Ibid., Article 6.

alter the market share threshold depending on prevailing economic circumstances.<sup>20</sup> By way of comparison regarding the parallel concept of dominance under EU law, the EU Commission suggests that where an undertaking has a market share of less than 40 per cent it is not likely to be dominant.<sup>21</sup>

### Exemptions

It is possible for parties to restrictive agreements or engaged in practices related to a dominant position, to obtain an exemption pursuant to a ministerial resolution in relation to these practices or agreements where they will enhance economic development, the improvement of the performance of establishments, the competitive ability of establishments, development of production or distribution systems or consumer benefits.<sup>22</sup> Establishments wishing to take advantage of this exemption will have to make an application to the MoE, who will then have 90 days to make a decision (this period may be extended by a further 45 days). If no decision is issued during this period, then the agreement or practice will be deemed to be exempted.<sup>23</sup>

The precise scope of this exemption is as yet unknown.

## Penalties for Non Compliance

### Merger Control

Establishments that fail to notify economic concentrations which meet the market share thresholds within

the 30 day period will be subject to a fine of: (i) two to five per cent of their annual revenue from sales of products or services, subject of the violation, in the UAE in the most recent completed financial year<sup>24</sup> or (ii) where the figure in (i) cannot be calculated, between AED 500,000 – AED 5 million (approximately €100,000 - €1 million). Establishments are also liable to fines of between AED 50,000 — AED 500,000 (approximately €10,000 - €100,000) for gun-jumping (unlawful pre-merger coordination between the parties to an economic concentration).<sup>25</sup>

### Abuse of Dominance and Restrictive Agreements

Establishments found to be in violation of the Competition Law in relation to the provisions on restrictive agreements and/or abuse of dominance are liable for fines of between AED 500,000 – AED 5 million (approximately €100,000 - €1 million).<sup>26</sup>

Where establishments repeatedly breach the Competition Law, penalties may be doubled.<sup>27</sup>

In addition to the imposition of fines, the courts have discretion, by order, to shut down establishments found in breach of the Competition Law for a period of three to six months.<sup>28</sup> The Competition Law however, does not elaborate precisely what shutting down the business entails.

<sup>24</sup> Ibid., Article 17.

<sup>25</sup> Ibid., Article 10(2) and Article 18.

<sup>26</sup> Ibid., Article 16.

<sup>27</sup> Ibid., Article 21.

<sup>28</sup> Ibid., Article 22. Furthermore, the court may rule to publish this verdict once or more times in two local newspapers at the cost of the violating party.

<sup>20</sup> Ibid., Article 6(2).

<sup>21</sup> Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, paragraph 14.

<sup>22</sup> Competition Law, Article 7.

<sup>23</sup> Ibid., Article 8(1).